

Contract interpretation  
Ambiguity  
Evidence  
Adverse inference rule

Niedermeyer v. Hartvig, BAP No. OR-97-1909  
(Bankr. Case No. 393-34767-elp7)

11/13/98

BAP, aff'g ELP

unpublished

The BAP affirmed the bankruptcy court's order sustaining the trustee's objection in part to Niedermeyer's claim. The claim was based on a settlement agreement between Niedermeyer and the trustee, which included a provision that Niedermeyer's claim was deemed allowed in the amount of \$1,329,883.57. Niedermeyer asserted that he was entitled to attorney fees and interest in addition to the allowed claim amount.

The BAP held that state contract law applies to interpretation of a settlement agreement, even if the underlying cause of action is federal. The bankruptcy court did not err in concluding that, under Oregon law, the settlement agreement was ambiguous with regard to whether attorney fees and interest were to be allowed in addition to the amount set out in the agreement. The court did not err in finding, after hearing testimony from Niedermeyer and the trustee's counsel, that the set amount of the allowed claim included attorney fees and interest, and that attorney fees and interest were not allowable in addition to the set amount. The court also did not err in finding that the parties treated the claim as undersecured, so that § 506 did not apply.

The BAP also affirmed the bankruptcy court's allowance of testimony from the trustee's counsel, or in refusing to draw an adverse inference from the trustee's failure to testify.

# NOT FOR PUBLICATION

## UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re ) BAP No. OR-97-1909-RiJRy  
)  
NIEDERMEYER-MARTIN COMPANY, ) Bk. No. 393-34767-elp7  
)  
Debtor. )  
\_\_\_\_\_)  
LINUS J. NIEDERMEYER, SR. )  
)  
Appellant, )  
v. )  
DONALD HARTVIG, Trustee, )  
)  
Appellee. )  
\_\_\_\_\_)

# FILED

MEMORANDUM NOV 13 1998

NANCY B. DICKERSON, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

Argued and Submitted on September 23, 1998  
at San Diego, California

Filed - November 13, 1998

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: RIBLET,<sup>2</sup> JONES, and RYAN Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrine of law of the case, res judicata, or collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36-3.

<sup>2</sup> Hon. Robin L. Riblet, Bankruptcy Judge for the Central District of California, sitting by designation.

This appeal arises from the bankruptcy court's order sustaining the Trustee's partial objection to Appellant's claim, specifically ruling that the claim shall not include any additional attorney's fees or interest. The panel **AFFIRMS** the decision of the bankruptcy court.

## I. FACTS

Prepetition, Linus J. Niedermeyer (hereinafter "Appellant") sought dissolution of the Debtor corporation. That litigation was resolved by a written agreement of September 1991, wherein the Debtor agreed to pay Appellant \$1,200,000 for Appellant's stock holdings in the Debtor, with interest, plus additional premiums of \$75,000 and \$136,000. To secure the obligations, Edward Niedermeyer, President of the Debtor, granted a security interest in his Circle Diamond Ranch located in Clackamas County, and the Debtor granted security interests in its corporate headquarters building in Portland, Oregon (sometimes referred to as the Lloyd Center property) and a parcel owned by the Debtor located in Millersberg, Oregon (sometimes referred to as the Linn County property).

Subsequent to the filing of the Debtor's bankruptcy petition, the Trustee filed an adversary action to set aside Appellant's alleged security interests in the Debtor's two real properties, alleging the security interests were preferential and/or fraudulent transfers. The Trustee and Appellant settled that action as evidenced by the parties' Settlement Term Sheet

1 and the Trustee's Motion to Approve Settlement, filed January  
2 31, 1995.

3       The relevant terms of the Settlement were as follows.  
4 Appellant's claim was "deemed allowed in the amount of  
5 \$1,329,883.57 and not subject to objection or modification,  
6 except the unsecured portion of the claim shall be reduced to  
7 the extent of any funds received by [Appellant] under this  
8 settlement or otherwise under the Settlement Agreement dated  
9 September 18, 1991." The Trustee was to sell the Portland and  
10 Millersberg properties, with Appellant having the option to  
11 acquire the properties. The sale proceeds of each of the two  
12 properties, net costs of sale and valid encumbrances, were to be  
13 divided 45 percent to Appellant and 55 percent to the Trustee.  
14 Pending sale, net rents from both properties were to be divided  
15 in the same proportion. The Trustee retained, free of any claim  
16 of Appellant, all rental income received between the petition  
17 date and January 1995. In the event that distribution to  
18 general unsecured creditors was less than 10 percent (excluding  
19 from the calculation the unsecured portion of Appellant's  
20 claim), Appellant was to waive his unsecured claim in the  
21 estate. Otherwise, Appellant's unsecured claim was to be paid  
22 as a general nonpriority unsecured claim. Appellant was to  
23 retain his liens and security interests on both properties until  
24 sale and distribution of the sale proceeds.

25       Paragraph 6 of the Settlement Term Sheet was the source of  
26 the parties' later disagreement. It provided, "Any funds

1 received by [Appellant] under this settlement shall be first  
2 applied to pay interest and attorney's fees incurred by  
3 [Appellant]."

4 The settlement was noticed to creditors through two  
5 separate Notices of Intent to Settle Adversary Proceeding, the  
6 first dated November 4, 1994, and the second dated December 23,  
7 1994. The bankruptcy court approved the settlement. Appellant  
8 received \$43,971 as his share of rents pending the sales,  
9 \$280,919 as his share of the net proceeds from the sale of the  
10 Linn County property, \$298,230 as his share of the net proceeds  
11 from the sale of the Portland property, and \$160,000 from the  
12 Clackamas County property.<sup>3</sup>

13 More than two years after the parties' settlement,  
14 Appellant's counsel sent to the Trustee's counsel a statement of  
15 account reflecting the agreed-upon claim amount, but adding  
16 additional sums for interest and attorney's fees. After  
17 application of the sales and rent proceeds received from the  
18 Trustee, and other amounts received from the Clackamas County  
19 property, Appellant asserted a claim balance of \$1,000,847. It  
20 is the interest and attorney's fees portion of this asserted  
21 claim to which the Trustee objected. An evidentiary hearing was  
22 held on October 20, 1997.

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25 <sup>3</sup> As noted, the Clackamas County property was not owned by the  
26 Debtor but was property of Edward Niedermeyer. Thus, these  
funds apparently were paid to Appellant outside of the estate.

1       The bankruptcy court sustained the Trustee's partial  
2 objection, expressing an understanding that the parties were  
3 dealing with an undersecured claim. In interpreting the  
4 document, the court started with the basic legal framework  
5 provided by the Bankruptcy Code that interest and attorney's  
6 fees post-petition are recoverable only to the extent that the  
7 creditor has an oversecured claim under § 506.<sup>4</sup> The court noted  
8 that Appellant's testimony as to his understanding of the terms  
9 of the settlement was not particularly persuasive because the  
10 settlement terms were negotiated between Appellant's counsel and  
11 the Trustee's counsel, and neither the Trustee nor his counsel  
12 had communicated directly with Appellant. The court further  
13 noted that the uncontroverted evidence was that the Trustee's  
14 counsel had conversations with Appellant's counsel relative to  
15 the meaning of paragraph 6 and had made contemporaneous notes  
16 reflecting that the Trustee's counsel was told by Appellant's  
17 counsel that paragraph 6 had no bearing on the Trustee. The  
18 court found that paragraph 6 did not define the extent to which  
19 interest and attorney's fees would be allowable. Thus, the  
20 court determined that the ambiguous agreement should be  
21 interpreted consistently with the testimony of the Trustee's  
22 counsel that paragraph 6 was not intended to contradict the  
23 basic Bankruptcy Code structure regarding interest and  
24 attorney's fees, but simply dictated how the funds received

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25  
26       <sup>4</sup> Unless otherwise indicated, all references to Chapters and  
Sections are to the Bankruptcy Code, 11 U.S.C. §§ 101 - 1330.

1 would be applied to the claim.

## 3 II. ISSUES

4 Two issues are presented on appeal: 1) whether the  
5 bankruptcy court made an error in interpreting the parties'  
6 written settlement agreement, and 2) whether the bankruptcy  
7 court abused its discretion in overruling Appellant's relevancy  
8 objection to the testimony of the Trustee's counsel.

## 10 III. STANDARD OF REVIEW

11 Where the interpretation of a contract involves review of  
12 extrinsic evidence, this court reviews findings of fact for  
13 clear error while reviewing de novo the principles of law  
14 applied to those facts. In re Tamen, 22 F.3d 199, 203 (9<sup>th</sup> Cir.  
15 1994); Stephens v. City of Vista, 994 F.2d 650, 655 (9<sup>th</sup> Cir.  
16 1993). The bankruptcy court's evidentiary rulings are reviewed  
17 for an abuse of discretion. Glover v. BIC Corp., 6 F.3d 1318,  
18 1328 (9<sup>th</sup> Cir. 1993).

## 20 IV. DISCUSSION

### 21 A. Application of State Law

22 Appellant argues that the bankruptcy court erred in ruling  
23 that the parties' agreement was ambiguous. Appellant also  
24 disputes Trustee's argument that Oregon law applies to the  
25 construction of the parties' agreement.

1       An agreement to settle a legal dispute is a contract  
2 governed by principles of local law which applies to  
3 interpretation of contracts generally, even if the underlying  
4 cause of action is federal. United Commercial Insurance  
5 Service, Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9<sup>th</sup> Cir.),  
6 cert. denied, 506 U.S. 1022, 113 S.Ct. 660, 121 L.Ed.2d 585  
7 (1992); see also Stephens v. City of Vista, 994 F.2d at 654-55.  
8 In this instance, the bankruptcy action was pending in the  
9 District of Oregon. The parties' settlement resolved  
10 Appellant's claim and Appellant's alleged security interests in  
11 two pieces of real property owned by the Debtor, both of which  
12 were located in Oregon. Oregon law will apply.

13  
14 **B. The Bankruptcy Court did not Err in Finding the Agreement**  
15 **Ambiguous**

16       Under general principles of Oregon contract law, contracts  
17 are to be construed to effectuate the objectively reasonable  
18 intentions of the parties, if possible. Local 3-7,  
19 International Woodworkers of Am. v. DAW Forest Prods. Co., 833  
20 F.2d 789, 793 (9<sup>th</sup> Cir. 1987) (citing Van v. Fox, 278 Or. 439,  
21 564 P.2d 695, 699 (1977)). The parties' intentions are found in  
22 the language of the contract and the surrounding circumstances.  
23 U.S. Nat'l Bank of Oregon v. Caldwell, 60 Or.App. 639, 642, 655  
24 P.2d 180, 182 (1982), rev. denied, 294 Or. 536, 660 P.2d 682  
25 (1983) (citing Spooner v. Polk County, 19 Or.App. 557, 562, 528  
26 P.2d 597 (1974)). In determining whether a contract is



1 ambiguous, the court may consider the circumstances under which  
2 it was made, including the situation of the subject and of the  
3 parties, so that the judge is placed in the position of those  
4 whose language she is interpreting. Sunset Coatings Co., Inc.  
5 v. Oregon State Dept. of Transportation and Highway Division, 62  
6 Or.App.53, 56, 660 P.2d 164, 166 (1983), rev. denied, 294 Or.  
7 792, 662 P.2d 728 (1983); P & C Construction Co. v. American  
8 Diversified/Wells Park II, 101 Or.App. 51, 56, 789 P.2d 688, 691  
9 (1989). Extrinsic evidence is admissible for that purpose  
10 without first having to establish the existence of an ambiguity.  
11 Deerfield Commodities, Ltd. v. Nerco, Inc., 72 Or.App. 305, 317,  
12 696 P.2d 1096, 1105 (1985), rev. denied, 299 Or. 314, 702 P.2d  
13 1111 (1985).

14 A contract provision is unambiguous if the language is "so  
15 clear as to preclude doubt by a reasonable person." However, if  
16 the language is "capable of more than one sensible and  
17 reasonable interpretation," it is ambiguous. P & C Constr., 101  
18 Or.App. at 55-56 (citing Deerfield Commodities, 72 Or.App. at  
19 317 n.7).

20 The bankruptcy court found the parties' agreement to be  
21 ambiguous. The bankruptcy court's legal conclusion is reviewed  
22 de novo. Tamen, 22 F.3d at 203. This panel starts with a  
23 review of the language of the parties' entire settlement  
24 agreement. An agreement is to be construed as a whole,  
25 employing reasonable methods of interpretation to give effect to  
26 every word and phrase. U.S. Nat'l Bank of Oregon, 60 Or.App. at

1 643 (citing New Zealand Ins. v. Griffith Rubber, 270 Or. 71, 75,  
2 526 P.2d 567 (1974)). The paragraphs are to be read together to  
3 attempt to give a meaning to each that does not defeat the  
4 purpose of the others. Id. (citing Cleveland v. Scio School  
5 Dist., 30 Or.App. 945, 949, 569 P.2d 35 (1977)).

6 Paragraph 6 of the Settlement Term Sheet provides, "Any  
7 funds received by [Appellant] under this settlement shall be  
8 first applied to pay interest and attorney's fees incurred by  
9 [Appellant]." However, under paragraph 14 of the agreement, the  
10 Appellant's claim was fixed in a precise amount, and not subject  
11 to objection or modification. Specifically, the claim was  
12 "deemed allowed in the amount of \$1,329,883.57 and not subject  
13 to objection or modification, except the unsecured portion of  
14 the claim shall be reduced to the extent of any funds received  
15 by [Appellant] under this settlement or otherwise under the  
16 Settlement Agreement dated September 18, 1991." While there is  
17 reference to a possible reduction of the claim amount, there is  
18 no reference in the agreement to any possible increase in the  
19 claim amount. Nowhere in the Settlement Term Sheet is there  
20 reference to interest and attorney's fees other than in  
21 paragraph 6. The language of the Settlement is not "so clear as  
22 to preclude doubt by a reasonable person" as to what the parties  
23 intended.

24 Furthermore, the language of the agreement is "capable of  
25 more than one sensible and reasonable interpretation." One  
26 plausible reading is that taken by the court below, that

1 paragraph 6 was not intended to contradict the basic Bankruptcy  
2 Code structure regarding interest and attorney's fees, but  
3 simply dictated how the funds would be applied to the claim.  
4 Another plausible interpretation is to read paragraph 14 after  
5 taking the net amount from paragraph 6, since paragraph 6  
6 alludes to some anticipation of a further accounting or  
7 calculation of Appellant's claim. This is the interpretation  
8 urged by Appellant. Because the language is capable of more  
9 than one reasonable interpretation and is not so clear as to  
10 preclude doubt, the bankruptcy court correctly found the  
11 parties' agreement to be ambiguous.

12  
13 **C. The Bankruptcy Court did not Err in Interpreting the**  
14 **Agreement**

15 Two witnesses testified at the evidentiary hearing:  
16 Appellant and John H. Durkheimer, the Trustee's counsel.  
17 Appellant testified that he understood that he was going to  
18 receive interest and attorney's fees in addition to the amount  
19 agreed upon. Appellant further testified that he never talked  
20 to the Trustee or to the Trustee's counsel prior to execution of  
21 the agreement, and that his understanding of the agreement came  
22 through his own attorney. Appellant's testimony as to such  
23 discussions is consistent with that of the Trustee's counsel,  
24 Mr. Durkheimer, who testified that his only discussions were  
25 with Appellant's counsel and he had no discussions with the  
26 Appellant.

1       Mr. Durkheimer testified that paragraph 6 was designed so  
2 that any funds received by Appellant would be applied to pay  
3 interest and attorney's fees which Appellant incurred, to the  
4 extent that interest and attorney's fees were included in the  
5 approximate \$1.3 million claim.<sup>5</sup> Mr. Durkheimer had no  
6 understanding of the interest rate that was to be applied and  
7 had never asked to look at Appellant's attorney's fees.

8       Mr. Durkheimer further testified that he had conversations  
9 with Appellant's counsel regarding the meaning of paragraph 6  
10 and had made contemporaneous notes. Those notes indicated that  
11 Appellant's attorney told Mr. Durkheimer that paragraph 6 had no  
12 bearing on the Trustee. Mr. Durkheimer stated that he did not  
13 care how Appellant and his counsel applied the money, and he  
14 believed that the wording of paragraph 6 may have been to  
15 encourage payment of Appellant's counsel's fees or may have had  
16 tax implications. Mr. Durkheimer understood that paragraph 6  
17 meant Appellant would be in a position to pay interest and  
18 attorney's fees upon receipt of proceeds under the settlement  
19 and that he must pay those first. Mr. Durkheimer testified, "If  
20 we had intended attorney's fees to be paid, we would have set  
21 forth a mechanism by which it could have been done. We would  
22 have been explicit. We would have been clear." Mr.  
23 Durkheimer's testimony was uncontroverted.

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25       <sup>5</sup> The difference between the claim amount of \$1,329,883.57 and  
26 the original \$1,200,000.00 settlement amount may be interest and  
attorney's fees referred to in paragraph 6.

1       The Trustee's Motion to Approve Settlement is consistent  
2 with Mr. Durkheimer's testimony. In that Motion, the Trustee  
3 had argued that even if the Trustee was successful in litigation  
4 with Appellant and avoided Appellant's interest in the real  
5 property, the Appellant would still have an unsecured claim in  
6 the amount of \$1,329,883.57, which amount represented  
7 approximately 35 percent of total unsecured claims. Thus, the  
8 Trustee explained in his Motion that even if the Trustee was  
9 successful in litigation against the Appellant, the Appellant  
10 would still be entitled to a dividend of 35 percent, or  
11 approximately \$350,000, whereas under the terms of the  
12 Settlement, Appellant would receive \$450,000 and the estate  
13 would save an estimated \$75,000 in attorney's fees. Nowhere  
14 does the Motion raise the possibility of Appellant's claim  
15 increasing in amount. The Affidavit of Service attached to the  
16 Trustee's Motion reflects that the Motion to Approve Settlement  
17 was served on counsel for the Appellant.

18       The record provides no basis for the Trustee in this  
19 instance to circumvent the provisions of the Bankruptcy Code.  
20 Based upon Mr. Durkheimer's testimony as to paragraph 6 and the  
21 consistent representations set forth in the Trustee's Motion to  
22 Approve Settlement, there was no clear error in the bankruptcy  
23 court's construction of the parties' agreement consistent with  
24 Mr. Durkheimer's testimony that paragraph 6 was not intended to  
25 contradict the basic Bankruptcy Code structure regarding  
26 interest and attorney's fees.

1       The bankruptcy court made an implicit finding that  
2 Appellant's claim was undersecured. Appellant argues that he  
3 held an oversecured claim and there was never a determination  
4 under § 506 to determine the value of his secured claim. To the  
5 extent that the bankruptcy court presumed his claim was  
6 undersecured, Appellant contends that that presumption was  
7 clearly erroneous.

8       Mr. Durkheimer testified that the amount of the secured  
9 portion of Appellant's claim was not significant, but the  
10 secured portion was treated in paragraph 2 where that claim  
11 would be paid 45 percent of the sale proceeds. The balance of  
12 Appellant's claim was to be paid as a general nonpriority  
13 unsecured claim.

14       In addition to this testimony, the Settlement Term Sheet  
15 makes three references to Appellant's "unsecured" claim. The  
16 first two references are contained in paragraph 4 which provided  
17 that in the event that distribution to general unsecured  
18 creditors was less than 10 percent, Appellant was to "waive his  
19 unsecured claim in this estate. Otherwise, [Appellant's]  
20 unsecured claim shall be paid as a general nonpriority unsecured  
21 claim." The third reference is contained in paragraph 14, which  
22 fixed the amount of Appellant's allowed claim, and provided that  
23 the "unsecured portion of the claim" shall be reduced by the  
24 funds received under the settlement.

25       Based on the uncontroverted testimony of the Trustee's  
26 counsel and the language of the parties' Settlement, the

1 bankruptcy court's determination that the parties treated the  
2 claim as undersecured for purposes of their Settlement agreement  
3 was not clearly erroneous.

4 Appellant further argues that the bankruptcy court did not  
5 give sufficient probative weight to the fact that a second  
6 Notice of Intent to Settle was sent to creditors, allegedly at  
7 Appellant's insistence and for the primary purpose of clarifying  
8 the payment of interest and attorney's fees to Appellant.

9 Comparison of the two separate Notices of Intent to Settle  
10 reveals that numerous substantive changes were made in the  
11 Second Notice. In addition to a slight variance in the  
12 introductory paragraph describing the claims settled, as well as  
13 a change in the hearing date, the second notice reflected the  
14 following substantive changes from the first notice:

- 15 • The second notice described the sale as "free and clear of  
16 liens;"
- 17 • The second notice added the statement that Appellant was  
18 granted an option to purchase the properties;
- 19 • After stating the amount of Appellant's claim, the second  
20 notice added the statement that Appellant's claim "shall be  
21 deemed allowed in that amount, less [Appellant's] other  
22 recoveries under the Agreement described below;"
- 23 • The second notice added an entirely new paragraph stating  
24 that the Settlement was conditional upon the Trustee's  
25 successfully avoiding the claim or interest of Annamae  
26 Niedermeyer in the properties and proceeds thereof;

- 1 • The second notice added an entirely new paragraph stating  
2 that the Appellant authorized the Trustee to use up to  
3 \$25,000 of cash collateral to pay the premiums on Edward  
4 Niedermeyer's life insurance policy; and
- 5 • The second notice added an entirely new paragraph stating,  
6 "All funds received by [Appellant] under this settlement  
7 shall be first be [sic] applied to pay interest and  
8 attorneys fees incurred by [Appellant]."

9 The court allowed Appellant to testify about his  
10 understanding of the second notice, but questioned whether  
11 Appellant was the proper witness to establish what prompted the  
12 second notice to be sent. Appellant testified that the problem  
13 with the first notice was it did not clarify the payment of his  
14 legal and accounting fees, and that this was remedied by the  
15 second notice.

16 Although the bankruptcy court made no specific findings as  
17 to the significance of the second notice, the record reflects  
18 that in addition to adding language relative to the application  
19 of funds to interest and attorneys fees incurred by Appellant, a  
20 number of other substantive changes and additions were made to  
21 the second notice. This evidence belies Appellant's contentions  
22 as to the purpose of the Second Notice. Therefore, we cannot  
23 conclude that there was any clear error in the lower court's  
24 weighing of the probative value of the evidence presented.



1     **D.     Evidentiary Issues**

2             Appellant maintains that the bankruptcy court erred in  
3     admitting and giving weight to the testimony of the Trustee's  
4     counsel, because the Trustee's counsel was not a party to the  
5     agreement. As noted above, in interpreting the parties'  
6     intentions, Oregon state law permits the court to consider the  
7     surrounding circumstances under which a contract was made. Both  
8     Appellant and the Trustee's counsel testified that the  
9     Settlement was negotiated between counsel only. The  
10    uncontroverted evidence was that Mr. Durkheimer had specific  
11    conversations with Appellant's counsel as to the meaning and  
12    purpose of paragraph 6. Mr. Durkheimer's testimony was thus  
13    relevant to the interpretation of the ambiguous document. The  
14    bankruptcy court did not abuse its discretion in overruling  
15    Appellant's objection to the relevancy of Mr. Durkheimer's  
16    understanding of the Settlement.

17            Appellant urges application of the adverse inference rule  
18    and contends that the Trustee's failure to testify leads to the  
19    inference that Trustee's own understanding and intent relative  
20    to paragraph 6 was consistent with that of Appellant, and  
21    adverse to the testimony of Mr. Durkheimer. The record reflects  
22    that the Trustee was present at the hearing. Appellant was at  
23    liberty to call the Trustee himself. The decision to draw an  
24    adverse inference lies within the sound discretion of the trier  
25    of fact. Underwriters Laboratories Inc. v. NLRB, 147 F.3d 1048,  
26    1054 (9<sup>th</sup> Cir. 1998). An adverse inference is not proper where

1 there is no claim of the witness' favorable disposition towards  
2 the non-producing party and the witness is equally available to  
3 both parties. United States v. St. Michael's Credit Union, 880  
4 F.2d 579, 597 (1<sup>st</sup> Cir. 1989); Underwriters Laboratories, 147  
5 F.3d at 1054. In view of the Trustee's presence at the hearing  
6 and equal availability, as well as Appellant's failure to raise  
7 this issue at the evidentiary hearing, the bankruptcy court did  
8 not abuse its discretion in deciding not to draw an adverse  
9 inference from the Trustee's failure to testify.

#### 10 11 V. CONCLUSION

12 The evidence supports the findings and conclusions of the  
13 bankruptcy court. There was no clear error in the court's  
14 construction of the parties' agreement. The court did not abuse  
15 its discretion in allowing the testimony of the Trustee's  
16 counsel. Accordingly, this panel **AFFIRMS** the decision of the  
17 bankruptcy court.